

[Cite as *State v. Smith*, 2006-Ohio-2365.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 21058
v.	:	T.C. NO. 04 CR 3060
JAMES E. SMITH	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

OPINION

Rendered on the 12th day of May, 2006.

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WOLFF, J.

{¶ 1} James Smith was convicted by a jury in the Montgomery County Court of Common Pleas of aggravated burglary and rape. Smith was designated a sexually oriented offender and was sentenced to nine years of imprisonment for the aggravated burglary and to eight years of incarceration for the rape, to be served consecutively.

{¶ 2} On appeal, Smith raises four assignments of error, which we will address in

an order that facilitates our analysis.

{¶ 3} IV. “THE CONVICTION OF JAMES SMITH IS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 4} In his fourth assignment of error, Smith argues that his convictions were based on insufficient evidence and were against the manifest weight of the evidence.

{¶ 5} “[S]ufficiency’ is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541, citing Black's Law Dictionary (6th Ed.1990) 1433. When reviewing the sufficiency of evidence, the relevant inquiry is whether any rational finder of fact, viewing the evidence in a light most favorable to the state, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, 683 N.E.2d 1096, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. A guilty verdict will not be disturbed on appeal unless “reasonable minds could not reach the conclusion reached by the trier-of-fact.” *Id.*

{¶ 6} In contrast, when a conviction is challenged on appeal as being against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175,

485 N.E.2d 717. Because the trier of fact sees and hears the witnesses and is particularly competent to decide “whether, and to what extent, to credit the testimony of particular witnesses,” we must afford substantial deference to its determinations of credibility. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. “Contrastingly, the decision as to which of several competing inferences, suggested by the evidence in the record, should be preferred, is a matter in which an appellate judge is at least equally qualified, by reason and experience, to venture an opinion.” *Id.* A judgment should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin*, 20 Ohio App.3d at 175.

{¶ 7} According to the state’s evidence, on October 6, 1997, J.E. was living alone in an apartment located in Montgomery County, Ohio. At approximately 9:00 p.m., J.E. went to sleep in her bedroom. At that time, her front door was open approximately two feet with the storm door closed and locked. At approximately 1:00 a.m., she heard a click and saw the table lamp turn on in her living room near her bedroom door. She saw a man in the doorway, and the light was quickly turned off. J.E. did not see the man’s face and assumed it was her boyfriend, Gil. A moment later, the man jumped on J.E.’s back and tied her hands behind her back with the cords from her bedroom telephone. The man rolled J.E. onto her back, placed a pillow over her face, and vaginally raped her. Afterward, the man bound J.E.’s feet with cord of a telephone and rummaged through her jewelry case, cigarette case and purse, taking various items. After the apartment was quiet for a while, J.E. untied part of the cords around her arms and legs, went to the kitchen and called 911. J.E. reported the robbery but not the rape. When the police arrived, they noticed a tear in the screen door which had not previously been there.

{¶ 8} At approximately 9:45 a.m. that day, J.E. went to Kettering Medical Center, where a sexual assault examination was performed. Several samples were collected, including a vaginal swab and skin stain swabs. In addition, a sexual assault form was completed. All of the items were placed in a sexual assault evidence kit.

{¶ 9} Following J.E.'s examination, Detective David Howell of the Riverside police department received the sexual assault evidence kit from Valerie Phibbs, the nurse who observed the doctor's examination of J.E. Howell returned with J.E. to her apartment to collect evidence. Once there, he photographed the scene, dusted for and collected fingerprints, and collected the sheets, pillowcases, the telephone, and other pieces of evidence. Howell was able to remove a latent print from the telephone that was on the headboard of J.E.'s bed. The sexual assault evidence kit, the fingerprints, and other evidence were submitted to the Miami Valley Regional Crime Lab ("MVRCL").

{¶ 10} In December 1998, Annette Davis, a forensic scientist with MVRCL, identified semen in the vaginal swab and the skin swab from the sexual assault evidence kit. The samples were preserved for future analysis. At that time, MVRCL did not perform DNA analysis.

{¶ 11} In 2002, MVRCL began to receive a federal grant to outsource its non-suspect cases to a private laboratory to perform a DNA analysis. In May 2003, the vaginal swab and skin swab were sent to Bode Technology Group ("Bode") in Virginia, which generated a DNA profile consisting of thirteen pairs of numbers. This profile was returned to MVRCL. Amy Wunderlich, another forensic scientist at MVRCL, received the profile from Bode and entered it into the Combined DNA Index System ("CODIS"), a DNA database.

{¶ 12} On September 19, 2003, the profile submitted in J.E.'s case was matched to another profile in CODIS. MVRCL was informed that the matched sample belonged to Smith. On September 18, 2004, Detective Gina Geiger of the Riverside police department obtained oral swabs from Smith and submitted them to MVRCL for a comparison of his DNA profile to the profile generated by Bode. David Smith, a forensic scientist with MVRCL, performed a DNA analysis of (James) Smith's oral swab and compared it with the DNA profile from the vaginal swab. He concluded that Smith was the source of the sperm in the vaginal swab.

{¶ 13} In December 2004, Danny Lee Harness, a latent print examiner with MVRCL, compared a fingerprint that was lifted from the telephone in J.E.'s bedroom with known prints from Smith. The fingerprint on the telephone was identified as belonging to Smith. Aaron Davis, another latent print examiner with MVRCL, reviewed Harness's identification and also concluded that the print belonged to Smith.

{¶ 14} Through cross-examination, Smith's counsel attempted to establish that the DNA and fingerprint identification might have been erroneous. Testifying in his defense, Smith denied that he had broken into J.E.'s home and raped her. He testified that he was living in Columbus, Ohio, with his cousin, Teresa Hollis, and his daughter at the time of the offense. The state presented additional evidence in rebuttal that Smith had previously represented that he lived in Dayton in 1997.

{¶ 15} Upon review of the record, we find ample evidence from which the jury could have concluded that Smith had committed aggravated burglary and rape. The state presented evidence that a male individual had entered J.E.'s apartment without permission, raped her, and taken items from her cigarette case, purse, and jewelry box. There was

substantial evidence that Smith's DNA matched the DNA profile from J.E.'s sexual assault evidence kit. Moreover, although Smith asserts on appeal that there was no fingerprint evidence, the state presented evidence that Smith's fingerprint was found on the telephone from J.E.'s bedroom. Accordingly, the jury could have reasonably concluded that Smith unlawfully entered J.E.'s bedroom and raped her.

{¶ 16} Smith emphasizes that J.E.'s description of her attacker did not match his physical description. At trial, J.E. testified that she awoke when she heard the click of the table lamp in the living room, she "saw the person, turned [her] head and the light went out." She described the person as about five feet, ten inches tall, 190 pounds, and with an olive complexion. On cross-examination, J.E. agreed that she may have initially described her assailant as having a Hispanic-sounding voice. Smith testified that he is six feet, one inches tall and weighed 210 pounds in October 1997. Smith testified that he does not speak Spanish.

{¶ 17} Although J.E.'s description of her assailant did not match Smith, her testimony indicated that she had a limited opportunity to view her attacker. She further testified that she is nearsighted, that she was not wearing her glasses, and that she had initially assumed that the individual was her boyfriend. J.E. also stated that she did not see the individual's face. In light of this testimony and the forensic evidence linking Smith to the offense, the jury could have reasonably chosen to attach little significance to her physical description of the assailant and, instead, to credit the identification that was supported by the DNA and fingerprint evidence. Accordingly, we conclude that Smith's convictions for aggravated burglary and rape were based on sufficient evidence and were not against the manifest weight of the evidence.

{¶ 18} The fourth assignment of error is overruled.

{¶ 19} I. “JAMES SMITH WAS NOT AFFORDED HIS CONSTITUTIONAL RIGHTS AND WAS DENIED DUE PROCESS BY NOT BEING EVALUATED FOR COMPETENCY TO STAND TRIAL.”

{¶ 20} In his first assignment of error, Smith claims that the trial court erred when it denied his counsel’s request for a competency evaluation.

{¶ 21} A defendant is presumed to be competent. *State v. Rose*, Clark App. No. 2004 CA 40, 2005-Ohio-3182, ¶10. In order to rebut this presumption, the defendant must request a competency hearing and at a subsequent hearing, a preponderance of the evidence must show that the defendant, as a result of his present mental condition, is not capable of understanding the proceedings and is unable to assist in his defense. *Id.*; R.C. 2945.37(G). The court may order an evaluation of the defendant’s present mental condition, but it is not required to do so. R.C. 2945.371(A); *State v. Stahl*, Greene App. No. 2004-CA-69, 2005-Ohio-2239, ¶19. We review the court’s failure to order a competency evaluation for abuse of discretion. *Stahl* at ¶19.

{¶ 22} We find no abuse of discretion in the trial court’s refusal to order a competency evaluation in this case. Prior to the beginning of trial, the court discussed the competency issue with Smith, who stated that he did not want an evaluation and that he wished to proceed to trial that day. Smith’s counsel indicated that he believed “it would be best to have him evaluated just to make sure there’s nothing there that prevents him from understanding truly what’s going on *** the next two or three days.” However, Smith’s counsel made no specific argument as to why he believed Smith might be incompetent. In addition, Smith had no evidence to present at that time to suggest that Smith was

incapable of understanding the proceedings and was unable to assist in his defense. Based on the record presented, the trial court did not abuse its discretion when it declined to order an evaluation.

{¶ 23} The first assignment of error is overruled.

{¶ 24} III. “JAMES SMITH WAS DENIED A FAIR TRIAL BY BEING PRESENT DURING THE TRIAL IN HIS PRISON CLOTHES IN THAT HIS ATTIRE UNCONSTITUTIONALLY INFRINGED UPON HIS DUE PROCESS RIGHT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY.”

{¶ 25} In his third assignment of error, Smith contends that he was denied a fair trial when he was compelled to wear prison garb at his trial.

{¶ 26} The Supreme Court has held that a defendant’s right to due process is violated when he is compelled to appear at trial wearing identifiable prison clothing. *Estelle v. Williams* (1976), 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126. The court reasoned, in part, that “the constant reminder of the accused’s condition implicit in such distinctive, identifiable attire may affect a juror’s judgment.” *Id.* at 504-05. The Supreme Court, however, declined to establish a per se rule that invalidated a conviction whenever the accused wore jail clothing at trial. *Id.*; see, also, *State v. Dorsey* (Apr. 23, 1998), Cuyahoga App. No. 72177. Rather, when a defendant wears prison attire before the jury, the relevant inquiry is whether he was compelled to do so. *Id.* at 507.

{¶ 27} In the present case, the court spoke with Smith prior to jury selection regarding his clothing. The court stated its understanding that Smith’s counsel had brought him a shirt, jacket, and a pair of pants over the weekend and that Smith had been given the opportunity to put them on but Smith had refused. The court also stated that it understood

that Smith had wanted to wear the clothes in which he had been arrested six months before and that he had been told by the deputies that the clothes were more than likely very wrinkled and smelly. When Smith indicated that the clothes brought by his attorney were “too little,” a deputy informed the court that Smith had tried on the pants over his blue jail pants, that he had put on the jacket and took it off right away without the deputies being able to see how it fit, and that he had not tried on the shirt at all. Smith’s counsel further informed the court of the size of the clothes, adding that the pants were the waist size that Smith had told him, although the inseam length of the pants was 30 inches rather than 32 inches. The court gave Smith the option of wearing the clothes brought by his attorney or his jail clothing. The court further informed Smith that, if he chose to wear his jail garb, the court would instruct the jury not to infer anything from his attire or hold it against him. He told Smith, however, that the jury may make such inferences despite his instruction. Smith opted to wear his jail clothing. The court responded that if Smith changed his mind, he should inform his attorney so that the court could “make arrangements to have that clothing for you.”

{¶ 28} The record reveals that Smith was not compelled to wear his jail garb at trial. Smith was provided street clothes by his attorney but chose not to wear them because he did not like how they fit. Smith’s attorney’s statements reflect that he had made an effort to provide clothing that would fit Smith, although he acknowledged that the pants would have been short. The exchange between the court and Smith further demonstrated that the court was concerned that Smith was not in street clothes and attempted to resolve the situation prior to jury selection. Finally, although the transcript provided by the parties does not include voir dire, the court had indicated to Smith that it would instruct the jury not to

draw inferences from his clothing or to hold it against him. We presume that this cautionary instruction was, in fact, given and that the jury followed that instruction. *State v. Stallings*, 89 Ohio St.3d 280, 186, 2000-Ohio-164, 731 N.E.2d 159. We thus presume that the trial court's cautionary instruction cured any potential prejudice by Smith's appearance at trial in jail clothing. *Dorsey*, supra.

{¶ 29} The third assignment of error is overruled.

{¶ 30} II. "JAMES SMITH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AS SET FORTH IN *ANDERS V. CALIFORNIA*."

{¶ 31} In his second assignment of error, Smith claims that the trial court denied his right to a fair trial when it denied his request for new counsel. Smith asserts that he could not communicate with his attorney and, thus, his attorney could not properly prepare his defense. Smith acknowledges that his attorney advocated for him, and he stipulates that his attorney's conduct "fell within the wide range of reasonable professional assistance as outlined in *State v. Bradley*, [(1989), 42 Ohio St. 3d 136, 538 N.E.2d 373]." However, he claims that the denial of his motion for new counsel deprived him of the effective assistance of counsel.

{¶ 32} As we stated in *State v. Adair*, Montgomery App. Nos. 20606, 20607, 20608, 2005-Ohio-2858:

{¶ 33} "A criminal defendant's Sixth Amendment right to competent counsel does not extend to a right to counsel of the defendant's choice. *Thurston v. Maxwell* (1965), 3 Ohio St.2d 92, 93, 209 N.E.2d 204. Nor does the right to counsel include a right to a meaningful or peaceful relationship between counsel and defendant. *State v. Blankenship* (1995), 102 Ohio App.3d 534, 558, 657 N.E.2d 559, citing *Morris v. Slappy* (1983), 461

U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610. However, a criminal defendant may discharge a court-appointed attorney when the defendant can demonstrate a break-down in the attorney-client relationship to such a degree as to endanger the defendant's right to effective assistance of counsel. Specifically, an indigent defendant is entitled to the appointment of new counsel when there is a showing of good cause, such as a conflict of interest where the conflict is so severe that the denial of substitute counsel would violate the Sixth Amendment right to counsel. *Blankenship*, supra, at 558, 657 N.E.2d 559. Alternatively, the defendant may demonstrate a complete breakdown of communication or an irreconcilable conflict which leads to an unjust result. *Id.*; see also *State v. McCoy*, Greene App. No.2003-CA-27, 2004-Ohio-266." *Id.* at ¶4.

{¶ 34} Here, Smith requested new counsel at the conclusion of a conference in chambers immediately prior to jury selection. When asked why he wanted new counsel, Smith stated that it seemed that his attorney was "against me instead of bein' with me" and "we don't understand each other." The court denied the motion and indicated that the case would then proceed to trial.

{¶ 35} Based on the record before us, we cannot conclude that the court abused its discretion in denying the motion. Earlier in the conference, the court had stated to Smith that it was aware that he has "difficulty sometimes communicating with [his attorney], that you think the case ought to go one way and there are some things that he may want to do that you don't or either way." However, the court apparently did not believe – and we find no indication in the record – that there had been a complete breakdown in communication between Smith and his attorney.

{¶ 36} The second assignment of error is overruled.

{¶ 37} The judgment of the trial court will be affirmed.

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BROGAN, J. and FAIN, J., concur.

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